No. 12522

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE HARTLEY EMERY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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Jurisdiction.

Appeal from final decision [R. 34-37] of the United States District Court for the Southern District of California, Central Division, Hon. Leon R. Yankwich, District Judge.

This Court has jurisdiction of this appeal under Sections 1291 and 41, Title 28, United States Code, and Rule 73 (a) Federal Rules of Civil Procedure.

The District Court had jurisdiction according to the allegations of the complaint [R. 2-6] under:

Housing and Rent Act of 1949, 63 Stat. 21 (referred to in complaint [R. 2, Para. I] as Public Law 31, 81st Con-

gress, 1st Session.) The provisions of this Act pertinent to this appeal are printed in an appendix to this brief.

Housing and Rent Act of 1947, 61 Stat. 197, as amended.

Emergency Price Control Act of 1942, 56 Stat. 23, as amended.

U. S. District Judge Rodney has summarized the laws relating to rent control in his article entitled "History of Rent Control Laws with respect to Damages allowable thereunder" published in 9 Federal Rules Decisions, p. 501, the issue for February, 1950.

Statement.

Complaint filed June 9, 1949 [R. 6] was for treble damages, restitution and injunction. [R. 2.] The complaint did not state two separate causes of action by clearly naming them as first and second. The judgment [R. 37] dismissed the second cause of action. No injunction was issued. Treble damages were not mentioned in the judgment. [R. 34-37.] The judgment is for restitution of $1002.50 to four tenants of two units for alleged overcharges for housing accommodations [R. 36] and $43.72 costs.

The alleged overcharges for unit 820¼ [R. 6] were to tenant Norman L. Rogers, for the period January 7, 1945, to September 1, 1948, nearly three and two-thirds years, amounting to $507.50;

For unit 820¼ [R. 6] were to tenants Viva C. Shea and Patricia O'Brien for the period October 15, 1948 to June 30, 1949, amounting to $255.00;

And for unit 830 [R. 6] was to tenant Maxine W. Woody for the period October 27, 1948 to June 1, 1949, amounting to $240.00.

The judgment [R. 36] does not divide the $255.00 between tenants Shea and O'Brien.

Appellants as defendants moved to dismiss the complaint under Rule 12b, F. R. C. P. [R. 7]. The motion to dismiss was denied. [R. 13]. An opinion of the District Judge [R. 14-17] was rendered. See United States v. Emery, 85 F. Supp. 354. A motion for leave to file a second motion to dismiss [R. 18-21] was filed. This motion was denied. [R. 22.] Answer stating eight separate defenses [R. 22-24] was filed. Appellee as plaintiff filed its motion for judgment on the pleadings. [R. 24-29.] Opposition to this motion for summary judgment [R. 30-33] was filed. At the hearing on motion for judgment on the pleadings [R. 33] on December 19, 1949, plaintiff withdrew its prayer for an injunction and made no mention of treble damages [R. 34]. The Court granted motion of plaintiff for $1002.50 recovery to be paid to tenants when received, and made no mention of treble damages. Judgment was filed and entered for $1002.50 and $43.72 costs on December 21, 1949 [R. 34-37]. A motion to alter or amend the judgment was made [R. 38-40]. This motion was denied [R. 41]. Notice of appeal from the judgment was filed [R. 41-42]. The complete record designated on appeal has been printed.

Errors Relied on.

The Statements of Points [R. 46-47] contains seven items:

1. That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is unconstitutional.

2. That if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945.

3. That the four tenant beneficiaries who occupied two rental units were indispensable parties plaintiff.

4. The trial court erred in granting summary judgment against appellants.

5. That the trial court erred in denying appellants' motion to alter or amend the judgment under review.

6. That the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money.

7. That the United States Attorney under Section 507 of the United States Code Judiciary and Judicial Procedure was required to appear for plaintiff.

Argument.

I.

Sec. 204 of the Housing and Rent Act of 1949, 63 Stat. 21, became effective April 1, 1949. See Judge Rodney's History of Rent Control Laws, 9 F. R. D. 501. This section purports to give the United States a right of action. Sec. 204 specifically states that the United States does not have a right of action for thirty days after a violation has occurred. The thirty day period is provided for the tenant to file an action of his own or show his lack of right to bring the action. Therefore, no right of action for the United States existed initially until May 1, 1949. *Woods v. Miller,* 333 U. S. 138, upholding the constitutionality of the Housing and Rent Act of 1947 was decided February 16, 1948, more than one year before the passage of Sec. 204 of the 1949 Act. The 1949 amendment not being in existence it could not have been sustained by the Supreme Court in *Woods v. Miller. United States v. Shoreline Cooperative Apartments,* 338 U. S. 897, decided December 12, 1949, reversing 84 Fed. Supp. 660, *per curiam* on the authority of *Woods v. Miller,* did not pass on the point appellants raise here. So the question of constitutionality of the right of the United States to sue civilly one citizen (landlord) for and on behalf of another (tenant) is undetermined by the Supreme Court. Such bold action by the Government has not heretofore been attempted.

Art. 1, sec. 8, clause 11, of the Constitution gives Congress the power "to declare war." Under this power the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, was passed. Its purpose was declared to be "to prevent speculative, unwarranted and abnormal increases in prices and rents."

On March 30, 1949, when Congress passed Sec. 204 of the 1949 Act, we were in the waning days of the wars with Germany and Japan. The President had declared hostilities at an end on December 31, 1946, at noon.

Mr. Justice Jackson in his concurring opinion in *Woods v. Miller, supra,* indicated that there is a limit to the upholding of laws passed under the war power. That limit has been reached here. This law takes liberty from the citizen contrary to the very fundamentals of the Constitution.

II.

The Supreme Court of the United States in *Claridge Apartments Co. v. Commissioner,* 323 U. S. 141, 164, decided December 4, 1944, said:

"Retroactivity, even when permissible, is not favored except upon the clearest mandate."

In *Hassett v. Welch,* 303 U. S. 303, 314, decided February 28, 1938, the Supreme Court said:

> "In view of other settled rules of statutory construction which teach that a law is presumed, in the absence of a clear expression to the contrary, to operate prospectively * * *" citing *United States v. Magnolia Petroleum Co.,* 276 U. S. 160, 162. See, also, U. S. Supreme Court Digest, annotated, Statutes, Prospective or Retrospective Operation, Secs. 208, 209.

Three United States District Courts have held that the Housing and Rent Act of 1949 has no retroactive effect. See *United States v. Mashburn,* 85 Fed. Supp. 968, decided September 29, 1949; *United States v. Bize,* 86 Fed. Supp. 939, decided September 2, 1949; and *United States v. Gianoulis,* 86 Fed. Supp. 933, decided August 4, 1949.

The opinion in the *Gianoulis* case is by Judge Rodney, the author of the History of Rent Control Laws, *supra*. In his opinion he said:

> "The foregoing history of rent control enactments indicates to me that the Housing and Rent Act of 1949 must apply only prospectively and not retrospectively. Indeed, I would reach such a conclusion from a construction of the language of the 1949 Act itself, without resort to prior enactments."

In *United States v. Bize,* 86 Fed. Supp. 939, Judge Delehant said:

> "In summary, the court is satisfied that the amendment of 1949 might with full constitutional validity have been given a retroactive effect. The real question in that connection is whether it was thus framed. And the Court, at this time, is of the opinion that it was not."

And further, Judge Delehant said:

> "A familiar rule of statutory construction, which need not be too insistently labored here, declares that unless the contrary fairly appears by express declaration or necessary implication from the language of a statute, it will be presumed and considered to have only a prospective, and not a retroactive operation (citing cases)." "The presumption is clearly against retroactivity. And it is particularly strong when an antecedent operation would visit a therefore nonexistent harshness upon any person or group of persons. Nowhere in the section of the statute under review is there any language declaring its retrospective operation. And nothing in the Act of 1949, necessarily or even reasonably, implies such operation. Its purpose is equally, and it may well be argued better, served by an entirely prospective application."

In *United States v. Mashburn,* 85 Fed. Supp. 968, Judge Miller said:

> "The law making branch of the government is aware of the generally accepted canons of statutory construction, and in the absence of an expression of intention to the contrary, the Court feels compelled to conclude that Congress intended a prospective effect only."

The complaint herein [R. 2-6] filed June 9, 1949, began with alleged overcharges from January 7, 1945 (tenant Rogers) and ended with June 30, 1949 (tenants Shea and O'Brien). As to tenant Rogers the complaint is wholly retroactive. As to tenants Shea, O'Brien and Woody the complaint is retroactive and prospective, too. The complaint in these instances has ignored the thirty day period provided for tenant action and actually sued for a period not yet expired in one case and for a period which had expired only eight days prior to the complaint in another.

The complaint, if it in fact has two causes of action as the judgment indicates [R. 37], is subject to the construction in its paragraph I [R. 2] that its first count is for restitution under Sec. 205(a) of the Emergency Price Control Act, as amended, and its second count is for injunction, restitution and treble damages under sections 205 and 206 of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1949. Sec. 205(a) of the 1942 Act covers injunctive relief only. So the denial of an injunction removed from this case any relief under the 1942 Act. In the many laws relating to rent control

there are two basic ones, the 1942 Act and the 1947 Act. The 1947 Act superseded the 1942 Act *in toto*. The 1947 Act, effective July 1, 1947, as the complaint itself alleges in paragraph III [R. 3] superseded the 1942 Act. The 1947 Act provided in Sec. 203(a)

> "(a) After the effective date of this title, no maximum rents shall be established or maintained under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations." See Judge Rodney's History of Rent Control Laws, *supra*.

This section surely means that there can be no further causes of action under the 1942 Act, and makes a certain deadline of July 1, 1947, the effective date of the Act. The 1947 Act established a new and complete code of rent control as of its effective date. The 1947 Act did not give the United States a right of action against landlords. Neither did the 1948 Act. It was not until April 1, 1949, that that provision came into the law. In the way in which it was introduced (not to give a right of action to the United States until after the tenant had thirty days to act or show his disqualification to act) it can be said to be prospective only.

Under State law in California the retroactivity of laws is prohibited by statute. See Sec. 3 of the Civil, Civil Procedure and Penal Codes of California, which read the same—"no part of it is retroactive, unless expressly so declared."

III.

Sec. 367 of the Code Civ. Proc. of California requires:

> "Every action must be prosecuted in the name of the real party in interest, except * * *" (the exceptions are executor, administrator, trustee, or other representative.)

While this section is not controlling on this Court the principle it declares is a sound one.

From the judgment here it clearly appears that four tenants named therein are the real parties in interest. They each had causes of action which did not expire for one year after an alleged violation. They did nothing themselves. They waited for the windfall of Government assistance—no court costs, no attorneys' fees! Had they been parties they might have obtained restitution for the period preceding April 1, 1949. The United States, without right of action until May 1, 1949, could not recover on the tenants behalf for any overcharges before April 1, 1949. The United States had no right of action for tenants Rogers, Shea and O'Brien, or Woody. These tenants did not lose their rights to sue by the passage of the 1949 Act, but they have since lost their rights by not acting as free American citizens in attempting to assert any such rights themselves.

IV.

It was unfair to appellants to allow the plaintiff to amend its complaint at the hearing on the motion for judgment on the pleadings on December 19, 1949 [R. 33]. Plaintiff made two amendments, one express and one implied. Plaintiff withdrew its prayer for injunction, on which appellants were clearly entitled to a hearing, which was an express amendment. Plaintiff was silent about

treble damages, which was an implied amendment. There was no oral evidence to support the allegations of the complaint. There had been no request for admissions under Rule 36, F. R. C. P. The complaint was not verified. There were no affidavits. The appellants answer contained a Fifth defense "that the complaint herein fails to state a claim against defendants upon which relief can be granted." Rule 12(d) F. R. C. P. indicates that this defense raises issues of fact as well as law, otherwise it would not authorize the trial judge to continue any hearing until the trial upon the merits. Plaintiff had possession of the original registrations of the two units made on Form DD 6-D, showing the maximum rents on March 1, 1942, and, also, of any papers authorizing a 15% increase under the 1946 Act. Plaintiff was also required to show the amounts claimed to have been paid by Shea and O'Brien. The complaint did not divide this amount.

The complaint shows on its face that plaintiff did not comply with Sec. 204 of the 1949 Act. The complaint shows that plaintiff had no cause of action as to tenants Shea, O'Brien and Woody. The complaint was filed June 9, 1949, covering in the case of Shea and O'Brien, not a period which expired thirty days before June 9th, but actually for a period in advance of that date—to June 30, 1949. On the face of the complaint the plaintiff had no right of action until July 30, 1949. The complaint should have been dismissed as premature.

In the case of Woody the alleged violation occurred on June 1, 1949, *eight* not *thirty* days before the complaint was filed. Had Woody testified it would have been shown that she was not the only tenant of this unit.

V.

The motion to alter or amend the judgment was good. See Rule 54(a) Federal Rules of Civil Procedure.

VI.

Paragraphs 1, 2 and 3 of the judgment [R. 36] require its payment at a certain place, in certain forms, in an undivided amount respecting the individuals. Viva C. Shea and Patricia O'Brien, and forfeits the rights of the tenants to the money in case they cannot be found. There is no specification of effort to be made to find such tenants. The District Court had no authority in any of the rent control laws to make these requirements.

VII.

September 1, 1948, Sec. 507 of Title 28, U. S. Code became effective. The section then read:

> "(a) It shall be the duty of each United States Attorney, within his district, to:
>
> (1) * * *
>
> (2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned; * * *

Section 503 of the same title read:

> "The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires."

Paragraph (b) of Sec. 507 of the same title read:

> "The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States

attorneys, assistant United States attorneys, and attorneys appointed under Sec. 503 of this title, in the discharge of their respective duties."

Sec. 507 was amended May 24, 1949, 63 Stat. 100, by the insertion of this clause at the beginning of the section, namely—"Except as otherwise provided by law."

Section 205 of the Housing and Rent Act of 1949, amending Sec. 206 of the Housing and Rent Act of 1947, provided:

> "(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his power in any place *and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.*

Under chapter 31, Title 28, U. S. Code, even after the amendment of May 24, 1949, it is clear that the Attorney General has no authority to appoint attorneys except that specifically given in Secs. 502 and 503 of the chapter. The Attorney General's authority is to appoint attorneys to assist the United States Attorneys.

It is respectfully submitted that the Attorney General had no authority to grant to attorneys appointed by the Housing Expediter, and that the delegation of authority to attorneys, dated September 24, 1949, signed by the Acting Attorney General, published in the Federal Register of October 6, 1949, is void. This delegation reads:

> "Pursuant to the authority vested in me by Sec. 205, Public Law 31, 81st Congress, attorneys appointed by the Housing Expediter are hereby authorized to appear for and represent the United States in

any case arising under Secs. 205 or 206 of the Housing and Rent Act of 1947, as amended, and for that purpose to institute, conduct or maintain all civil actions, suits or proceedings, before or after judgment, arising under said sections of said act, and to defend the United States, the Housing Expediter or any officer or employee thereof, in any case arising under said act: Provided, however, that the foregoing authority shall not apply to any proceedings before the Supreme Court of the United States.

Dated: September 24, 1949.

PEYTON FORD,

Acting Attorney General.

The text of this so-called authority does not even mention authority for attorneys for the Housing Expediter to appear in cases arising under the Emergency Price Control Act of 1942. The complaint in paragraph I [R. 2] shows that this action is brought under Sec. 205(a) of the Emergency Price Control Act of 1942, as amended.

The duplication of legal machinery to represent the United States in the collection of refunds of rent is wholly unauthorized.

Conclusion.

The judgment of the District Court should be reversed.

DANIEL DOUGHERTY,

Attorney for Appellants.

Appendix.

Housing and Rent Act of 1949

Sec. 204. (a) Sec. 205 of the Housing and Rent Act of 1947, as amended, is amended by striking out from the heading of such section the words *"By Tenants";* by inserting after the words "receives such payment", in the first sentence, the following: "(or shall be liable to the United States as hereinafter provided)"; and by changing the period at the end of the second sentence to a colon and inserting: *"Provided,* That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations."

Sec. 205 "(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, *under such authority as may be granted by the Attorney General,* appear for and represent the United States in any case arising under this Act."